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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 640

GREAT LAKES DREDGE & DOCK COMPANY, Owner of the Steamtug *JOHN R. WILLIAMS*,

Petitioner,

against

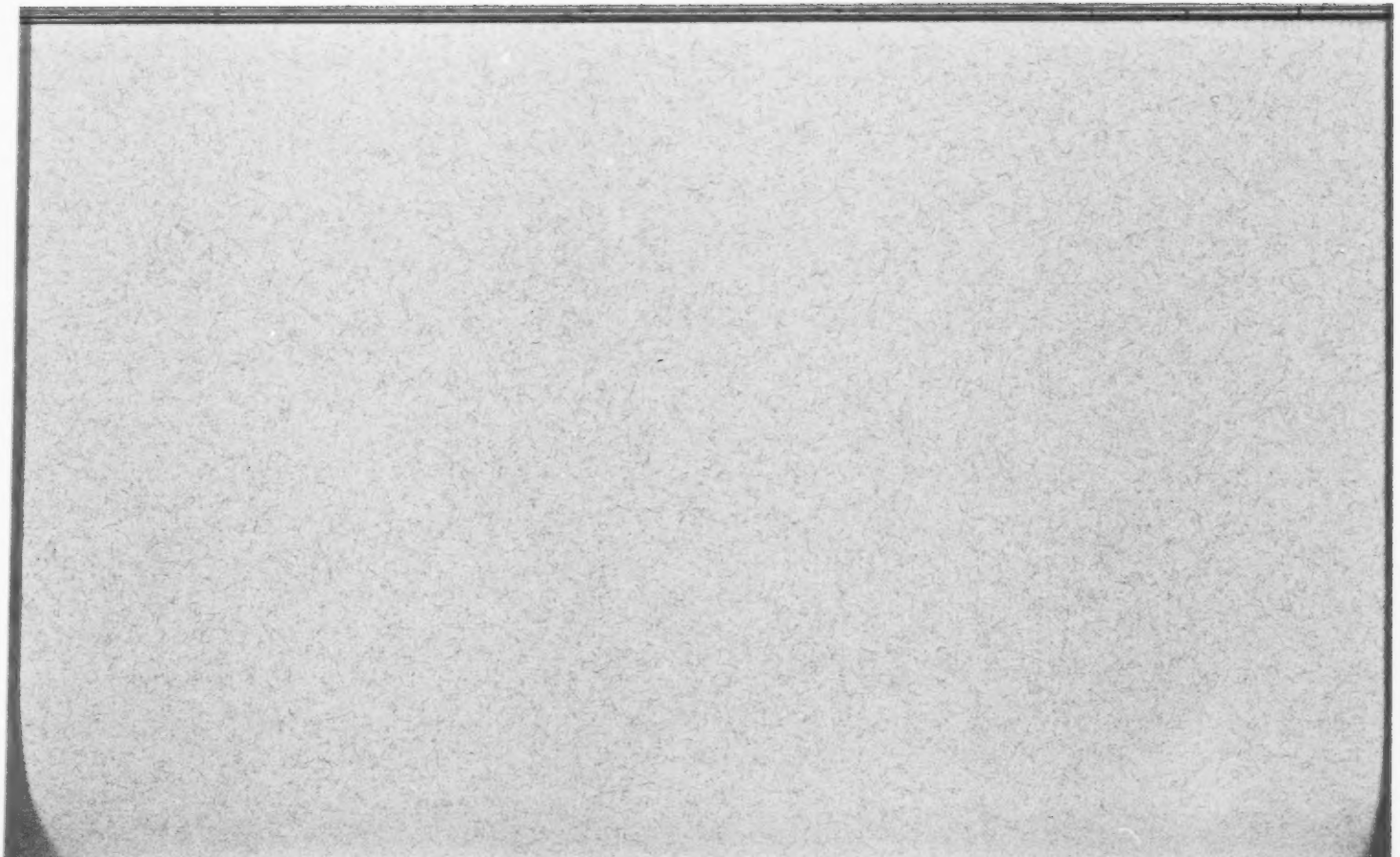
UNITED STATES OF AMERICA, Owner of Submarine Cable No. 555,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ROBERT S. ERSKINE,
Counsel for Petitioner.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.



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IN THE

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GREAT LAKES DREDGE & DOCK COMPANY, Owner of the steamtug *John R. Williams*,

Petitioner,

against

UNITED STATES OF AMERICA, Owner of Submarine Cable No. 555,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Great Lakes Dredge & Dock Company, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit entered August 12, 1944, under an opinion of that Court filed July 25, 1944, modifying and affirming in part a decree in admiralty of the District Court for the Southern District of New York in a suit of which the subject matter was not within the admiralty jurisdiction.

The petitioner respectfully shows as follows:

Jurisdiction.

The order for mandate below was entered August 12, 1944. (R. 175) Jurisdiction of this Court is provided by 28 U. S. C. §347 (a).

Opinions Below.

The findings and conclusions of District Judge Clancy are not officially reported, but are printed in the Record, (R. 138) and were published in 1941 A. M. C. 1588.

The opinion of District Judge Coxe, overruling exceptions to a Commissioner's report of the recoverable damages, is not officially reported, but is printed in the Record, (R. 155) and was published in 1943 A. M. C. 592.

The opinion of the Circuit Court of Appeals (R. 168), written by Judge A. N. Hand, Judges Learned Hand and Frank concurring, has not yet been reported officially but has been published in 1944 A. M. C. 1061.

The Nature of the Proceedings and the Designation of the Parties.

The petitioner was the appellant in the Court below, and was the respondent and claimant of the tug *John R. Williams* in the District Court. United States of America was the respondent below, and was the libelant in the District Court. To avoid confusion, the petitioner will be referred to herein as the Great Lakes Company, and the respondent will be referred to as the Government.

In the District Court, the Government libelled the Great Lakes Company *in personam,* and its tug *John R. Williams in rem* in admiralty for alleged damage to a submarine telephone cable, No. 555, maintained by the Government

across the bottom of New York Harbor, at The Narrows, between Forts Wadsworth and Hamilton (R. 3). The Great Lakes Company answered, challenging the jurisdiction of admiralty over the subject matter of the suit (R. 8), and, alternatively, contesting liability (R. 7). The Government never sought to remove the proceedings to the common law side of the Court, but took the admiralty suit to trial. The District Court, sustaining the admiralty jurisdiction, awarded to the Government a decree against the tug, *in rem*, and the Great Lakes Company, *in personam*, (R. 158) for a recovery of all the items of damage claimed by the Government, with one exception, (R. 143-156).

On appeal by the Great Lakes Company, the Circuit Court of Appeals held that the subject matter was not within the admiralty jurisdiction and modified the decree below by dismissing the libel *in rem* against the tug *John R. Williams*, but affirmed the decree in admiralty against the Great Lakes Company *in personam* on the Court's own suggestion that the Government's claim could have been asserted at law in the same District Court, that the Great Lakes Company had waived its right to a trial by jury by not demanding such a trial in accordance with Rule 38 of the Federal Rules of Civil Procedure and that therefore the decree *in personam* in admiralty should not be disturbed. (R. 174) The Circuit Court of Appeals refused to upset the decision of the District Court as to liability and the provable damages of the Government (R. 169-171).

The Questions Involved.

1. Whether the Circuit Court of Appeals, after finding that the subject matter of the suit was not within the jurisdiction of admiralty, should not have directed the entire

dismissal of the admiralty proceedings and erred in affirming the decree in admiralty against the Great Lakes Company *in personam.*

2. Whether the Circuit Court of Appeals, by its affirmance of the decree in admiralty *in personam,* after finding that the subject matter of the suit was not within the jurisdiction of admiralty, wrongly deprived the Great Lakes Company of the constitutional right to a trial by jury which it would have had if the Government's claim had been asserted at common law.

3. Whether the Circuit Court of Appeals (if its affirmance of the decree in admiralty *in personam* should be approved), wrongly departed from the rule of *restitutio in integrum,* as approved by this Court in the case of *Brooklyn Eastern District Terminal* v. *United States of America,* 287 U. S. 170, by affirming an award to the Government which included operating expenses of the Government's repair vessel that would have been incurred by the Government in any event.

4. Whether the Circuit Court of Appeals erred in affirming liability of the Great Lakes Company for acts of the master of its tug *John R. Williams,* of which the alleged consequences were wholly unforeseeable.

The Facts

Cable No. 555 is one of two submarine telephone cables lying across the bottom of The Narrows, between Forts Wadsworth and Hamilton (R. 27). The Government offered no evidence of the character of their use. The inference is that Cable No. 555 is used for routine communications between the Forts. There is no evidence and

no inference that it is used as an aid to navigation in any respect.

The area of The Narrows through which the cables are laid is marked upon the Government's charts (R. 29). The only prohibition with respect to that cable area is, as indicated by the warning signs on shore, that vessels shall not drop their anchors within the area (R. 29, 33).

On the morning of August 22nd, 1938, the Great Lakes Company's tug *John R. Williams* was towing a loaded dumpscow out through The Narrows, bound for the dumping grounds below Scotland Lightship. While passing through the aforesaid cable area the tug slowed, in accordance with the customary practice, to permit the War Department's patrol boat to come alongside and pick up the dumping permit required by Government regulations (R. 40, 49-50). The resulting slack in the tug's round 1¾ inch wire towing hawser (R. 49) permitted it to drop below the water, and when the tug attempted to proceed, after surrendering the permit, the hawser was found to be caught on some unknown underwater obstruction, of which the master of the tug had no knowledge or warning (R. 50-53). *Prima facie,* the tug's master had no reason to believe that the round towing hawser had caught or could have caught the round 2-3/16 inch submarine telephone cable (R. 22). Moreover, the underwater obstruction was so solid that it did not yield or give under the strain of the tug's engine and towing machinery (R. 29, 56). The tug was finally obliged to cut the towing bridle of the dumpscow, and when the towing hawser was thus freed and reeled in, its outer length was found to be shaved by something with a sharp edge (R. 52), a condition not explainable by contact with the round submarine telephone cable.

During the time when the tug was attempting to free her towing hawser, an automatic alarm in Fort Wadsworth indicated that Cable 555 had ceased to function (R. 28-29). When the Government's cable repair ship *Joseph Henry* subsequently raised the telephone cable it was found to have been severed, and its appearance indicated that it had been cut by some sharp instrument (R. 103, 115). The commanding officer of the *Joseph Henry* admitted that the tug's towing hawser could not have been the sharp instrument which cut the submarine cable (R. 115).

There is no evidence in the case that the tug's towing hawser ever contacted telephone cable No. 555; and there is no evidence as to how the telephone cable was cut. Nevertheless the District Judge found and concluded that the tug's hawser "was the agent which severed the libelant's cable" and that the tug's captain was negligent in trying to free his hawser from the unknown obstruction while in the cable area (R. 140).

The Government claimed the following damages:

1. Cost of new material used in repairing cable 555	$724.70
2. Fuel and water used by the repair vessel *Joseph Henry* during 8½ days work on cable No. 555	91.65
3. Rations for the *Joseph Henry's* crew, 8½ days	236.25
4. Pay of the *Joseph Henry's* crew, 8½ days	866.07
5. Pro rata share (8½ days) of cost of the annual overhaul of the *Joseph Henry*	244.38
Total	$2,163.05

The Great Lakes Company, reserving its right to appeal on the other points involved, tendered to the Government a decree for the cost of new material, $724.70, with interest and costs to the date of the tender (R. 142). The Government did not accept, but offered proofs before a commissioner appointed by the Court, who reported that the Government should recover all of the items except No. 5 (R. 143-151). His report was confirmed by District Judge Coxe (R. 155).

The Government's proofs before the Commissioner disclosed that the cable repair ship *Joseph Henry* is maintained by the Government on an annual basis; that the expenses of wages, and subsistence of the crew, and fuel accrue daily, even though the vessel is idle during extended periods in each year; that the *Joseph Henry* spent 8½ days in repairing Cable No. 555, during the period from August 26th to September 14th, 1938; that she had no other work to perform during that period; and that, after completing the repairs to Cable No. 555, she was idle for 18 out of the next succeeding 31 days (R. 75, 90-91, 113, 125). The Government failed to show that the use of the *Joseph Henry* in repairing cable No. 555 interfered with her performance of any other work, or resulted in any costs or expenses which the Government would not have incurred in any event, excepting the item for new material, $724.70.

Reasons for Allowance of the Writ.

1. Having found that the Government's suit was based on a non-maritime tort which was not within the admiralty jurisdiction, the Circuit Court of Appeals dismissed the libel only as against the tug *in rem*, and affirmed the decree in admiralty against the Great Lakes Company *in personam*, and that ruling should be reviewed by this Court for the following reasons:

A. The affirmance, in part, of a decree in admiralty, when admiralty was without jurisdiction, and the failure to direct a complete dismissal of the proceedings for lack of admiralty jurisdiction raises an important question of Federal law which has not been, but should be, passed upon and settled by this Court.

B. The failure to direct a complete dismissal of the libel for lack of admiralty jurisdiction would seem to be in conflict with the rulings of this court in *The Sarah,* 8 Wheat. 391; *United States* v. *Hart,* 73 U. S. 770; *Union Insurance Co.* v. *United States,* 73 U. S. 759; *U. S. Shipping Board* v. *Lustgarten,* 280 U. S. 320, and the decisions of this Court referred to in *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, at p. 689.

C. The failure to direct a complete dismissal of the libel for lack of admiralty jurisdiction and the affirmance of the admiralty decree against the Great Lakes Company *in personam* on the ground that the Government's cause of action could have been asserted in the same District Court at common law is in conflict with decisions of the Circuit Court of Appeal for the Ninth Circuit. *Westfall Larson & Co.* v. *Allman-Hubble Tug Boat Co.* 73 F. (2d) 200; *Nippon Yusen Kabushiki Kaisha* v. *Great Western Power Co.,* 17 F. (2d) 239, cert. denied 274 U. S. 745; and *Home Insurance Co.* v. *Merchants Transport Co.* 16 F. (2d) 372, and appears to be in conflict with the law of the Fourth and Fifth Circuits. *Waldo* v. *Wilson* (4th C.) 231 Fed. 654; *Sevin* v. *Inland Waterways Corp.* (5th C.) 88 F. (2d) 988.

2. In holding that the Great Lakes Company waived its constitutional right to trial by jury by failing to demand it in a proceeding commenced and determined in admiralty, in which issue had been joined as to the jurisdiction of admiralty, and which the District Court had held to be

within the admiralty jurisdiction, the Circuit Court of Appeals rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Crouch* v. *United States*, 8 F. (2d) 435, and decided an important question of Federal law which has not been, but should be, settled by this Court.

3. In holding that, because the Government's claim could have been asserted in the same District at common law, compliance with Rule 38 of the Federal Rules of Civil Procedure in a proceeding commenced and determined in admiralty was necessary to preserve the constitutional right to a trial by jury, the Circuit Court of Appeals decided an important question of Federal Law which has not been, but should be, settled by this Court.

4. The decision of the Circuit Court of Appeals is without statutory authority or rule of this Court and is in apparent conflict with the constitutional and statutory limitations of a court of admiralty jurisdiction referred to in *Detroit Trust Co.* v. *The Barlum*, 293 U. S. 21, 43; *Aktieselskabet* v. *Lloyd* (CCA. 2nd) 283 F. 62, approved by this court in *Armour* v. *Ft. Morgan SS Co.* 270 U. S. 253, 259; and *The Kearney* (CCA 3rd C.) 14 F. (2d) 949; and is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

5. The Circuit Court of Appeals, having sustained an admiralty decree *in personam* on an admiralty appeal, rendered a decision, on a Federal question, in conflict with the decision of this court in *Brooklyn Eastern Terminal* v. *United States*, 287 U. S. 170, in holding that the Government could recover damages for operating expenses of its repair vessel which it would have incurred in any event,

and which were not the result of any damage to cable No. 555.

6. In affirming the finding of the District Court that the navigator of the tug *John R. Williams* was negligent, the decision of the Circuit Court of Appeals is in conflict with the standard, in law, as heretofore laid down by this Court that unforeseeable consequences of an act may not be asserted in *tort* against the person performing the act. *Atchison etc. Ry. Co.* v. *Calhoun,* 213 U. S. 1, 7-9.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the decision below.

GREAT LAKES DREDGE & DOCK COMPANY,

By Robert S. Erskine,
Counsel for Petitioner.

Dated New York, October 25th, 1944.